

## **REMARKS**

**The Examiner rejected claim 8 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.** In response, Applicant has canceled claim 8.

Claim 9 was dependent from now-canceled claim 8, and Applicant has consequently changed the dependency of claim 9 from claim 8 to claim 1. Applicant has further amended the wording of the claim to distinguish between the post leveling assembly and the fence post upon which the leveling assembly is adapted to be mounted.

**The Examiner rejected claims 1-8 and 26-28 under 35 U.S.C. 102(b) as being anticipated by Von Arx (2,554,133).** In response, Applicant has amended independent claims 1 and 26 by including the limitation that the arm swings freely only in a plane disposed substantially parallel to the rear wall of the base. Applicant respectfully submits that Von Arx discloses a fairly complex pendulum level indicator that is, in the true sense, a plumb bob. Von Arx's pendulum indicator is capable of swinging freely in substantially any direction in response to movements made in the rod to which the device is mounted. This universal swinging movement is made possible because the pendulum indicator includes a spherical element 44 which is seated within recesses 36, 38 in a pair of semi-circular plates 36, 38. A relatively heavy shaft 56 extends downwardly from the spherical element 44 and into the interior 42 of the device. As the rod is moved, the shaft 56 is able to swing in any direction within interior

42 of the device. This is disclosed in column 2, lines 14-33. The arm of Applicant's device, on the other hand, only swings in a single plane - that being in a plane substantially parallel to the rear wall of the base. Von Arx's device is incapable of swinging in a single plane only because it is not pivotally mounted by a single pivot pin that restrains its swinging motion - it is mounted so that it can swing through 360°. As such, Applicant respectfully submits that Von Arx's device fails to read on this limitation of claims 1 and 26 and consequently does not anticipate these claims. Applicant therefore respectfully requests that the rejection of claims 1-8 and 26-28 under 35 U.S.C. 102(b) be withdrawn.

**The Examiner rejected claim 9 under 35 U.S.C. 103(a) as being unpatentable over Von Arx in view of Hunter (6,370,784) and Elsasser (6,457,756).** The Examiner stated that Von Arx shows that the post leveling assembly is permanently mounted to a post, but lacks the post with a core and removable sleeve. The Examiner states that Elsasser discloses a post with a core and Hunter discloses a post with a core and removable sleeve and having a leveling assembly permanently mounted onto the core. The Examiner stated that it would have been obvious to one of ordinary skill in the art to modify Von Arx to include the level indicator inside the post for the convenience of the use in selling the indicator and post as a single unit. Applicant respectfully disagrees with this statement.

Von Arx's device is designed to be permanently attached to a surveyor's rod and that rod is moved from place to place as the surveyor does his job. As such, Von Arx has designed and disclosed a solidly constructed, permanent, enclosed type of leveling device that is made for repeated use over a long period of time. Similarly, the device

disclosed by Hunter is meant to be used repeatedly - it is not a simple leveling assembly that is used once to orient a fence post and is then essentially disposed of. Hunter's device is a sophisticated, expensive tiltmeter that includes at least a pair of orthogonally mounted tilt sensors, mechanisms for rotating the tilt sensors, computer chips and circuitry mounted within a housing for protection. The tiltmeter gathers information about the borehole into which the device is lowered and then transmits that information to a remote monitoring station for analysis. Hunter's device is a sealed unit and is enclosed in a housing and lowered into a well borehole. The reason Hunter's device is placed inside a housing is because the device is being lowered into a hole in the ground and into a fluid and if the tiltmeter was placed on the outside of the housing it would be ripped off and damaged by the fluid.

Furthermore, Applicant respectfully submits that Hunter does not disclose a leveling device in the nature taught by Von Arx, the Applicant or the majority of references previously cited by the Examiner, i.e., Hunter's device is not one that indicates verticalness. Hunter teaches a tiltmeter, i.e., a device that measures the degree to which a body is off the vertical, not the degree to which it is on the vertical. While the difference between these arts is subtle, Applicant respectfully submits that the two areas of art lead away from each other, not toward each other. Consequently, Applicant submits that it is less likely that one of ordinary skill in the art would be led to combine the teachings of these two inventors because the devices are utilized for opposite purposes.

Those differences in art being noted, the Applicant hereby addresses the statement of the Examiner that it would be obvious to those of ordinary skill in the art to

modify Von Arx to incorporate the teachings of Hunter to include the leveling device inside the post for the convenience of selling the indicator and post as a single unit. Applicant disagrees with this statement. Applicant submits that the device proposed by Von Arx is too complex and too expensive to manufacture to use to level a fence and then simply dispose of the device by leaving affixed to the core of the post. Von Arx discloses making the larger end 60 of the shank 56 of the pendulum from a heavy metal such as brass and manufacturing the shank itself from aluminum. Furthermore, Von Arx's casing includes a curved glass window 30 recessed in channels in the casing and includes a plurality of elongated diametrically disposed ribs on the lower surface, with the ribs including tapered central portions that intersect each other to define a central indicating point for the plumb bob. A device of this complexity and produced from these types of materials would be relatively cheap if the device was used repeatedly. But, if the Von Arx leveling device was to be permanently incorporated into a plurality of fence posts, as is proposed by the Examiner, the cost for one-time leveling of those fence posts would be prohibitive. It would be more likely that the installer would simply resort to using a hand-held spirit level for the job.

Furthermore, even if one of ordinary skill in the art decided to modify the teachings of Von Arx's by installing the device onto a post as suggested by Hunter, Applicant submits that the actual structure of Von Arx's device would make this installation problematic. In order for the plumb bob of Von Arx's device to be able to swing universally, the device has to have a fairly deep and wide interior recess 42. This would mean that the casing of the device would extend outwardly away from the side wall of the post for a distance. It would not lay substantially flat against the side wall of

the post. Consequently, when the vinyl sleeve was slipped over the core of the device, the bottom end of the sleeve would engage the protruding casing. The casing might prevent the sleeve from sliding over the core, or the sleeve might rip the casing off the side wall or the end of the sleeve might be damaged as it engages the casing and is pushed downwardly past it.

Aside from the above reasons, Applicant submits that claim 9 is dependent from claim 1, which claim Applicant has amended to include the limitation that the arm of the device swing in only one plane, namely substantially parallel to the rear wall of the base of the device. Applicant respectfully submits that Von Arx does not disclose the arm swinging in one plane only, and neither Elsasser nor Hunter disclose this feature. Applicant therefore respectfully submits that claim 9 distinguishes over the cited prior art and requests the withdrawal of the rejection of the claim under 35 U.S.C. 103(a) over Von Arx in view of Hunter and Elsasser.

**The Examiner rejected claim 10 under 35 U.S.C. 103(a) as being unpatentable over Von Arx in view of Foss et al (5,956,855).** The Examiner stated that one of ordinary skill in the art would have appreciated using an indication means which was or is commensurate with the purpose and function of the indicator. In response, Applicant submits that Von Arx did provide an indication means that was commensurate with the purpose and function of the indicator - he provided a plurality of elongated diametrically disposed ribs on the lower surface, with the ribs including tapered central portions that intersect each other to define a central indicating point for the plumb bob. Von Arx's device is able to swing universally, i.e., in a plurality of directions. In a sense, Von Arx's device swings three dimensionally and consequently a

three-dimensional type of indicator has to be provided to indicate levelness in this device - hence the ribs terminate at a central indicating point. Color might potentially be added to these ribs, but would likely not be used as an alternative to the ribs as an installer could have difficulty determining which color band was being pointed to by the tip of the pendulum disposed a spaced distance inwardly from the casing of the device. Applicant however points out that claim 10 depends from claim 1, and submits that as claim 1 distinguishes Applicant's device over that of Von Arx, claim 10 is not obvious in view of the teachings of Foss et al.

**The Examiner rejected claims 11-13 and 16-21 under 35 U.S.C. 103(a) as being unpatentable over Von Arx in view of Gruetzmacher (5,207,004) and Elsasser.** The Examiner stated that Von Arx lacks the base member which is L-shaped in cross-section and adapted to receive a corner of a rectangular or square post therein, but that Elsasser discloses a square post and Gruetzmcaher discloses an L-shaped post level. **In response**, and for the reasons stated above, Applicant respectfully submits that the universally swingable plumb bob disclosed by Von Arx does not swing only in a single plane, as does the arm of the Applicant's device. Furthermore, the device disclosed by Von Arx is too complex and too expensive to be used in the manner contemplated by the Applicant. Furthermore, Von Arx's device protrudes outwardly away from the side wall of the post to which the device is mounted and consequently would interfere with the vinyl sleeve that is to be slipped over the core of the post. For these reasons, essentially doubling the number of plumb bobs, mounted in an L-shaped casing that would protrude outwardly away from two of the side walls of the post would make no sense to one of ordinary skill in the art. Von Arx's device

swings universally - i.e., it is multidirectional, consequently there would be no point mounting two universally swingable plumb bobs on the post when a single plumb bob could have done the job adequately. Furthermore, as discussed above, Von Arx's plumb bob is manufactured from relatively expensive materials when compared to plastic. Consequently, applying two plumb bobs to the side walls of the post would simply drive the cost of this disposable component up substantially. For these reasons, Applicant respectfully submits that one of ordinary skill in the art would not be led to modify Von Arx's device in the light of the teachings of Gruetzmacher and Elsasser. Furthermore, claims 11-13 and 16-21 depend from claim 1, which claim distinguishes over the Von Arx reference. Applicant therefore respectfully requests that the rejection of claims 11-13 and 16-21 under 35 U.S.C. 103(a) be withdrawn.

**The Examiner rejected claims 14-15 under 35 U.S.C. 103(a) as being unpatentable over Von Arx in view of Elsasser and Gruetzmacher and further in view of Hunter.** The Examiner stated that Arx discloses his base connected to the post by a screw or nail and that one of ordinary skill in the art would have appreciated connecting the base to the core by a suitable and well known securing means such as screws. **In response**, Applicant acknowledges that a variety of securing means could be utilized to secure the base to the post. However, Applicant respectfully submits that because claims 14-15 depend from claim 1 and claim 1, as argued above, distinguishes over the prior art, Applicant submits that claims 14 and 15 also distinguish over the prior art. Applicant therefore respectfully requests that the rejection of claims 14, 15 under 35 U.S.C. 103(a) be withdrawn.

**The Examiner rejected claim 22 under 35 U.S.C. 103(a) as being unpatentable over Von Arx in view of Gruetzmacher and Elsasser as applied to claim 11 and further in view of Foss et al.** In response, Applicant has argued previously that one of ordinary skill in the art would not be led to combine the teachings of Von Arx and Gruetzmacher by providing a second plumb bob as taught by Von Arx on an L-shaped base as taught by Gruetzmacher, because of the additional expense, additional protrusion of a casing away from the side walls of the core of the post and the fact that the second plumb bob would be essentially of no additional utility on the device. Furthermore, Applicant has argued that one of ordinary skill in the art would not be led to combine the teachings of Von Arx and Foss et al because the interior of the Von Arx casing is provided with ribs that terminate in a central and upwardly extending indicator that is designed to indicate verticalness when the apex of the plumb bob aligns therewith. The addition of color as taught by Foss to a combined Von Arx-Gruetzmacher device would not render claim 22 obvious inasmuch as the combination of Von Arx and Gruetzmacher is not likely to occur to one of ordinary skill in the art. Claim 22 depends ultimately from claim 1 and as previously argued, claim 1 is not obvious in light of the teaching of any of these references viewed either in combination or separately. Applicant therefore respectfully requests that the rejection of claim 22 under 35 U.S.C. 103(a), on the combination of these references, be withdrawn.

**The Examiner indicated that Claims 23-25 have been withdrawn as not being directed to the elected invention.**

**The Examiner rejected claims 29-30 under 35 U.S.C. 103(a) as being**



**unpatentable over Von Arx in view of Gruetzmacher and Elsasser.** As Applicant has argued previously, Applicant respectfully submits that combining the teachings of Von Arx and Gruetzmacher would not be undertaken by one of ordinary skill in the art because of the unnecessary duplication of expensive components and protrusion of two casings outwardly away from the sides of a post where the can interfere with a sleeve being inserted thereover. Claims 29-30 depend indirectly from claim 1, which claim Applicant has argued is allowable over the cited prior art. Applicant therefore respectfully requests that the rejection of Claims 29-30 under 35 U.S.C. 103(a) as set out above, be withdrawn.

Applicant respectfully submits that the Examiner has used hindsight reconstruction of the device to interpret the patents cited against the present application. Unlike the devices disclosed in the patents cited against the instant application, the Applicant's device is not complex in design, cumbersome nor expensive to manufacture or use. Applicant's device is made from a few, inexpensive plastic components. All that is required is a plastic base for attachment to a post, one or two small plastic arrow-shaped arms and plastic pivot pins to hold the arms on the base. A single stripe of color marked on each leg of the base is used to indicate verticalness when the associated arm apex is aligned therewith. An adhesive strip is applied to the rear surface of the base to secure the device to a post. Obviously, this design is simple, easy to manufacture, inexpensive and disposable. The arm of Applicant's device only swings in a plane substantially parallel to the rear wall of the leg of the base to which it is applied. Consequently, the entire leveling assembly can be manufactured to be a relatively very thin component which would prevent the device from interfering with a

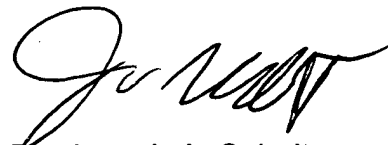
vinyl sleeve as it is slipped over the core of the post, the device can be manufactured inexpensively and disposed of without incurring undue costs, is easy to apply to a post and is easy to read during the installation process.

Applicant therefore respectfully argues that the amended claims overcome the Examiner's rejections and objections thereto and respectfully requests that a Notice of Allowability be issued with respect to all claims remaining in the application, those being claims 1-7 and 9-30.

Should the Examiner wish to discuss any issues raised in this response, she is invited to contact the undersigned as (330) 244-1174.

Respectfully submitted at Canton, Ohio this 21<sup>ST</sup> day of FEBRUARY, 2006.

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